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THE ALIEN TORT STATUTE AND FEDERAL COMMON LAW: A NEW APPROACH

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International human rights cases brought under the Alien Tort Statute (ATS)[1] raise a host of issues: whether the alleged conduct violates well-established international law,[2] the applicability and scope of various forms of secondary liability,[3] the contours of state action,[4] the extension of liability to private individuals and corporations,[5] the possible award of punitive damages,[6] application of alter ego and veil piercing doctrines,[7] whether plaintiffs must exhaust their remedies,[8] and so on. After *Sosa v. Alvarez-Machain*,[9] courts and commentators

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1 28 U.S.C. § 1350 (2006) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

2 *See, e.g.*, Abdullahi v. Pfizer, Inc., 562 F.3d 163, 185 (2d Cir. 2009); Viet. Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 116 (2d Cir. 2008).

3 *See, e.g.*, Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 257–59 (2d Cir. 2009); Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 288 (2d Cir. 2007).

4 *See, e.g.*, *Abdullahi*, 562 F.3d at 188; Romero v. Drummond Co., 552 F.3d 1303, 1316–18 (11th Cir. 2008); Kadic v. Karadzic, 70 F.3d 232, 239–40 (2d Cir. 1995); *In re* Sinaltrainal Litig., 474 F. Supp. 2d 1273, 1289–91 (S.D. Fla. 2006), *aff'd in part, vacated in part sub nom.*, Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (11th Cir. 2009); Doe v. Exxon Mobil Corp., 393 F. Supp. 2d 20, 26 (D.D.C. 2005).

5 *See, e.g.*, *Kadic*, 70 F.3d at 239–41.

6 *See, e.g.*, Arce v. Garcia, 434 F.3d 1254, 1256 (11th Cir. 2006); *In re* XE Servs. Alien Tort Litig., 665 F. Supp. 2d 569, 577 (E.D. Va. 2009).

7 *See, e.g.*, *In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 270–74 (S.D.N.Y. 2009).

8 *See, e.g.*, Sarei v. Rio Tinto, PLC, 550 F.3d 822, 829 (9th Cir. 2008) (en banc).

9 542 U.S. 692 (2004). The Court in *Sosa* held that a claim of unlawful detention by Mexican officials was not actionable under the ATS, but it reasoned that cases

have generally understood some of these issues as governed by federal common law[10] and others by international law; the choice between these two sources of law is often presented as binary.[11] Some forms of this approach can be analogized to *Bivens*[12] actions, with federal common law providing the cause of action and remedy, while international law supplies the conduct-regulating rules of decision.[13] It may be fair to say that the binary approach has become the prevailing narrative of ATS litigation.

There is, however, another way to understand the relationship between federal common law[14] and international law in ATS cases. Federal common law might be understood as applying to all of these aspects of ATS litigation, including the substantive standard for liability, although some aspects of that federal common law (including the substantive standard of liability) are closely linked to international law. Thus, the relationship between federal common law and interna-

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based on clearly established norms of international law (which did not include short-term detention) could go forward. *See id.* at 724–25. For an introduction to the *Sosa* case, see Brad R. Roth, *Scope of Alien Tort Statute—Arbitrary Arrest and Detention as Violations of Custom*, 98 AM. J. INT'L L. 798 (2004).

10 Courts have occasionally held or suggested that some of these issues are governed by state or foreign law. *See, e.g.*, Doe I v. Unocal Corp., 395 F.3d 932, 949 (9th Cir. 2002), *reh'g en banc granted*, 395 F.3d 392 (9th Cir. 2003), *dismissed*, 403 F.3d 708 (9th Cir. 2005); *In re* Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493, 496 (9th Cir. 1992).

11 *See, e.g.*, Kiobel v. Royal Dutch Petrol. Co., 621 F.3d 111, 147–48 (2d Cir. 2010); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 260 (2d Cir. 2009); Khulumani v. Barclay Nat'l Bank Ltd., 540 F.3d 254, 266 (2d Cir. 2007) (Katzmann, J., concurring); *id.* at 287 (Hall, J., concurring); *Unocal*, 395 F.3d at 948–49; *id.* at 963 (Reinhardt, J., concurring); *In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 256; BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 35 (2d ed. 2008); William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 RUTGERS L.J. 635, 639 (2006); Paul L. Hoffman & Daniel A. Zaheer, *The Rules of the Road: Federal Common Law and Aiding and Abetting Under the Alien Tort Claims Act*, 26 LOY. L.A. INT'L & COMP. L. REV. 47, 52 (2003); Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 65 (2008); Carlos Manuel Vázquez, Sosa v. Alvarez-Machain *and Human Rights Claims Against Corporations Under the Alien Tort Statute*, *in* HUMAN RIGHTS AND INTERNATIONAL TRADE 137, 142 (Thomas Cottier et al. eds., 2005). For a different argument, see Anthony J. Sebok, *Taking Tort Law Seriously in the Alien Tort Statute*, 33 BROOK. J. INT'L L. 871, 897 (2008), promoting a "global tort law" in ATS cases.

12 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 390–98 (1971).

13 *See* Casto, *supra* note 11, at 640; Ernest A. Young, Sosa *and the Retail Incorporation of International Law*, 120 HARV. L. REV. F. 28, 31, 34–35 (2007), http://www.harvardlawreview.org/issues/120/february07/forum_417.php.

14 Federal common law is discussed *infra* Part I.A.

tional law is not binary but instead is best understood on a continuum, with certain aspects of ATS litigation governed by federal common law that is tightly linked to international law, other aspects governed by federal common law that is not derived from international norms, and still others that fall somewhere in between. The extent to which federal common law is tied to international law in ATS cases is determined then by the inferred intentions of Congress and separation of powers because these are the bases upon which the development of federal common law in ATS cases is authorized after *Sosa*.[15] Congressional authorization and separation-of-powers considerations are linked, however, to the content of international law. Finally, according to this approach, the federal common law applied in ATS cases is best understood as sui generis—it is its own enclave of federal common law that is not necessarily binding or preemptive outside the context of ATS litigation.[16] These distinctions would not make a difference in the outcome of *Sosa*, of course. Whether we call it customary international law, or "international law *cum* common law,"[17] Alvarez-Machain's ATS claim based on short-term unlawful detention did not meet the high bar imposed by the *Sosa* Court.[18] Nevertheless, applying international law as part of a federal common law that governs all aspects of ATS may change the outcome of cases that turn on issues like secondary and corporate liability.

Moreover, it is preferable on descriptive, doctrinal, and normative grounds, as Part I below explains. Part I begins by describing the prevailing views on federal common law and the rule of decision in ATS cases. It then explains that applying federal common law to all substantive issues in ATS cases is preferable. In short, no issues in ATS cases are actually resolved through application of "pure" international law—instead, the law applied is filtered through the particular history

15 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 725–31 (2004); *see also* Curtis A. Bradley et al., Sosa, *Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869, 893–97 (2007) (summarizing the *Sosa* Court's holding that the ATS was purely jurisdictional and grants of federal jurisdiction were not the same as grants to create federal common law); *cf.* Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 59–75 (2009) (emphasizing courts' historical application of the law of nations to implement separation of powers).

16 *Cf.* William S. Dodge, *Bridging* Erie*: Customary International Law in the U.S. Legal System after* Sosa v. Alvarez-Machain, 12 TULSA J. COMP. & INT'L L. 87, 88 (2004) (suggesting based on *Sosa* that "[t]he Court seems inclined to address the role of customary international law in the U.S. legal system issue-by-issue, incorporating it for some purposes but not others").

17 *Sosa*, 542 U.S. at 712.

18 *See id.* at 733.

and origins of the ATS itself, along with other factors unique to the United States. Descriptively, the federal common law approach is more accurate. Doctrinally, courts and litigants have wasted much time and energy choosing between "international" and "domestic" law, neither of which alone provides a satisfactory resolution of most contested issues. Normatively, federal courts may avoid (in whole or in part) the charge that they misunderstand customary international law, and they may be in a position to develop some norms of customary international law that are not yet fully developed, depending in part on the intentions of Congress and the executive branch. Part I concludes by explaining how a federal common law approach would work, although one might agree that federal common law applies to all aspects of ATS litigation but disagree with the specific conclusions reached here about congressional intent and deference to the executive branch. Parts II and III explain how issues of secondary and corporate liability would be analyzed under the federal common law approach. The examples explored in this section illustrate why the choice between international and domestic law are not satisfactory. Part IV explores how the international law of prescriptive jurisdiction limits the kinds of ATS cases that can go forward.

I. FEDERAL COMMON LAW AND THE RULE OF DECISION IN ATS CASES

The Court in *Sosa* held that, based on the ATS, federal courts can recognize a private cause of action for violations of international law that are "accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms"[19] of assaults against ambassadors, safe conducts, and piracy. The *Sosa* Court was clear that the modern ATS cause of action is generated by federal common law (circumscribed by the content of modern international law);[20] it was less clear about the nature of the substantive, rule-of-decision law applied in ATS cases.

19 *Id.* at 724–25.

20 *See id.* at 732 ("[W]e are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted."); *id.* at 738 ("[The defendants' conduct] violates no norm of customary international law so well defined as to the support the creation of a federal remedy."); *id.* ("Creating a private cause of action . . . would go beyond any residual common law discretion we think it appropriate to exercise.").

A. *The Rule-of-Decision Law Applied in ATS Cases*

There are, roughly speaking, three possibilities. First, customary international law might be a different kind of federal common law than the federal common law that provides the cause of action. Under one version of this view, customary international law is already federal common law without the need for incorporation by a federal statute, but other issues in ATS litigation would presumably be governed by the standard post-*Erie*[21] federal common law, which does need some basis in domestic positive law.[22] As international law does not itself provide a civil cause of action for ATS cases, presumably that aspect of ATS litigation would be covered by this second form of federal common law, consistent with the language in *Sosa* itself.[23] The federal common law that provides the cause of action is to be developed by the courts as other post-*Erie* common law; the substantive rule of decision is, on the other hand, simply supplied by customary international law as developed independent of the U.S. courts themselves. *Sosa* does not, however, compel the view that two different kinds of federal common law are at work in ATS cases.

Another possibility is that customary international law in ATS cases is not any sort of federal common law at all, but is simply applied directly as international law,[24] like the application of foreign law in some cases in U.S. courts.[25] This may be how some courts understand

21 Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

22 *See* Casto, *supra* note 11, at 641–42 ("[T]here is little doubt that international law is incorporated into United States domestic law as a form of federal common law. . . . Therefore the international norms that are essential to the existence of a cause of action in ATS litigation are technically classified as a type of domestic law. But the branch of federal common law that incorporates international law is significantly different from other types of federal common law."). A variation of this position is that customary international law lacks any status as federal common law absent incorporation by the political branches, but is applied as the rule of decision in ATS cases because it has been incorporated into domestic law by the ATS. Courts lack power to develop customary international law as federal common law, although they do have the power to develop the cause of action as other federal common law is developed. This variation is obviously distinct with respect to the status of customary international law generally, but it would also view customary international law as federal law, but beyond the power of the courts to develop; because it shares these two characteristics, I have grouped it here.

23 *See id.* at 642.

24 *Cf.* Vázquez, *supra* note 11, at 142 ("The opinion [in *Sosa*] strongly suggests that the courts are to look to international law to determine whether a primary rule of international law has been violated. If such a violation has occurred, the existence of a secondary rule entitling the plaintiff to relief is a matter of judge-made federal common law.").

25 *See* Young, *supra* note 13, at 31, 34–35.

what they are doing post-*Sosa*,[26] but this view is not compelled by the *Sosa* case itself. It is in tension with the original application of international law under the ATS because that law was understood as part of the general law in 1789[27] (thus the cause of action and rule of decision law did not come from different sources), although all approaches would be in some tension with the original. In any event, under both this approach and the first, federal courts simply apply customary international law as the rule of decision, but at least in theory do not control its development and content, even as applied in federal courts (although they do partially control the creation of a cause of action or remedy).[28]

Advanced here is a third possibility: both the cause of action and the rule of decision in ATS cases after *Sosa* are governed by the same kind of judge-made, post-*Erie* federal common law. This approach does not have a natural constituency in the academy, as it tracks neither the "modernist"[29] nor the "revisionist"[30] views that emerged prior to *Sosa* and which have dominated much of the scholarship since.[31] Revisionists argue that customary international law is not part

26 *See In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 256 (S.D.N.Y. 2009) (analogizing ATS cases to post-*Erie* diversity cases in which federal courts apply state law).

27 *See* Young, *supra* note 13, at 31.

28 The differences between the first and second approaches go in part to the nature of customary international law as federal law under Articles III and VI of the Constitution rather than affecting the outcome of ATS cases themselves. *See* Dodge, *supra* note 16, at 100–07.

29 *See, e.g.*, Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561–62 (1984); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1852–60 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 376 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After* Erie, 66 FORDHAM L. REV. 393, 433, 447 (1997).

30 *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 852–53 (1997); A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1, 47–48 (1995); *see also* Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365, 392 (2002) (suggesting that whether the modernists or revisionists are correct really depends on how different the new federal common law is from pre-*Erie* general common law and therefore "whether customary international law can fit within the established bounds of this new federal common law").

31 *See* Young, *supra* note 13, at 28 ("*Sosa* . . . has become something of a Rorschach blot, in which each of the contending sides in the debate over the domestic status of customary international law (CIL) sees what it was predisposed to see anyway."); *see also* Bradley et al., *supra* note 15, at 924–35 (positing the areas in which the debate as to the status of customary international law and domestic law will be most

of domestic U.S. law unless the political branches incorporate it into domestic law; they tend not to like federal common law. Modernists argue that customary international law is part of federal common law even without incorporation by the political branches and generally see ATS litigation as applying customary international law that has independent status as federal common law even outside the ATS context. In my view, however, understanding virtually all issues in ATS litigation as governed by federal common law,[32] the development of which is understood to have been authorized by Congress through the enactment of the ATS,[33] makes the most sense in the post-*Erie* ATS landscape created in *Sosa*.

This approach might seem foreclosed by the Court's conclusion in *Sosa* that, as enacted in 1789, the ATS was jurisdictional only, and did not give courts the power to create new causes of action or "mold substantive law."[34] In discussing the post-*Erie* application of the ATS, however, the Court acknowledges that judges "will find a substantial element of discretionary judgment in the decision,"[35] that "federal courts may derive some substantive law in a common law way,"[36] and that courts are, in fact, creating causes of action based on international law.[37] Equally significantly, the key limitation that *Sosa* places on modern ATS litigation—it must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have rec-

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prevalent in the next decade); William S. Dodge, *Customary International Law and the Question of Legitimacy*, 120 HARV. L. REV. F. 19, 19–21 (2007), http://www.harvardlawreview.org/issues/120/february07/forum_407.php (claiming revisionists misrepresent *Sosa* and fail to provide legitimacy for an incorporation requirement); Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest:* Sosa v. Alvarez-Machain *and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241, 2290–92 (2004) (proposing The Human Rights Abuse Compensation and Deterrence Act as a solution to the debate). Some post-*Sosa* scholarship does not take a position on these earlier debates. *See, e.g.*, Keitner, *supra* note 11, at 66 n.19.

32 Exceptions include issues governed by the Federal Rules of Civil Procedure, the Foreign Sovereign Immunities Act, and the application of canons of statutory interpretation, which are not generally understood as part of federal common law.

33 *See* Koh, *supra* note 29, at 1843–44 ("Much of the federal courts' lawmaking in the human rights area represents statutory gap-filling, particularly with respect to statutes such as the ATCA and the Torture Victim Protection Act (TVPA).").

34 Sosa v. Alvarez-Machain, 542 U.S. 692, 713 (2004).

35 *Id.* at 726.

36 *Id.* at 729.

37 *Id.* at 725 ("[T]here are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind.").

ognized"[38]—is unchanged by viewing the international law applied in ATS cases, as well as the cause of action itself, as federal common law. Moreover, this approach is preferable on descriptive, doctrinal, and normative grounds.

B. Federal Common Law as the Rule of Decision: Advantages

Understanding international law as federal common law in ATS cases puts courts' decision-making on more accurate conceptual footing as a descriptive matter. One of the key questions that courts must wrestle with in ATS litigation—whether the international norm in question enjoys the same level of consensus and specificity that piracy, violations of safe conducts, and assaults against ambassadors enjoyed in 1789—is not one that bears any real relation to modern customary international law. To be sure, U.S. courts must examine the content of contemporary international law *qua* international law to determine whether to supply a cause of action, but they do so through a lens derived entirely from the unique nature of the ATS statute in the U.S. legal system. The substantive conduct-regulating standards that emerge obviously correspond to a subset of customary international law, but determining what norms are part of that subset is a uniquely U.S. undertaking. The dual-sources approach also trades at times upon a static, bright-line view of international law, pursuant to which "the court does not make international law; rather it discovers pre-existing rules that have been 'legislated through the political actions of the governments of the world's states.'"[39]

One need not view customary international law as radically (or even especially) indeterminate to reject this description of what courts actually do in some ATS cases. These cases call upon domestic courts to translate international norms into domestic civil litigation, which often means applying norms developed in international criminal law to domestic civil law and wrestling with questions of individual, corporate, and secondary liability that are in some state of evolution and flux in customary international law. To say, for example, that courts have merely "discovered" that aiding and abetting liability in civil cases requires a mens rea of purpose,[40] or that they merely "discovered"

38 *Id.*

39 Casto, *supra* note 11, at 642 (quoting Henkin, *supra* note 29, at 1561–62).

40 Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009); *cf.* Bradley & Goldsmith, *supra* note 30, at 855 (making this point about customary international law generally).

that corporations can be held civilly liable under international law,[41] is entirely unconvincing.

Doctrinally, courts and commentators have struggled to determine whether international law or domestic federal common law governs questions such as the existence and scope of secondary liability and the viability of ATS claims against corporations. In fact, neither alternative is fully convincing. These questions are critical to the scope of the ATS, because they help define the kind of injury that is actionable. The statute is designed to redress violations of international law, and it would thus be odd to conclude that these issues should be resolved without reference to international law. On the other hand, international law is still developing in these areas,[42] to some extent because international law relies itself on domestic law and international tribunals to help develop these doctrines through enforcement.[43] It would thus be odd to conclude that they must be resolved *in toto* with no relationship to domestic law. Treating these as questions of federal common law that are developed with reference to international law is a better approach in ATS cases. It is also doctrinally superior because it avoids the threshold question of which kind of law to apply[44] and allows courts to focus on the more significant questions: the content of domestic and international law, and the intentions of Congress and the executive branch.[45]

Normatively, although it may seem counterintuitive, this approach may foster and encourage the development of international law and enhance the position of U.S. courts in the international community. As I describe below, by applying federal common law, courts may arguably rely on (and foster the development of) *some* international norms that are not yet clearly established in particular contexts, at least when doing so would not violate international law in other respects. There are relatively few international prosecutions for violations of international law and even fewer civil claims in domestic courts. Many of the questions that arise in ATS cases lack well-devel-

41 *In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 254–55 (S.D.N.Y. 2009).

42 *See* Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 450 (2001); discussion *infra* Part III.

43 With the exception of the Rome Statute, for example, treaties generally do not set out the mens rea requirements for aiding and abetting liability, leaving that issue to domestic implementation and to international tribunals. *See* discussion *infra* Part II.C.

44 *See* Sarei v. Rio Tinto, PLC, 550 F.3d 822, 827–28 (9th Cir. 2008) (en banc) (applying exhaustion as a "prudential principle" in the "wake of *Sosa*," in part to avoid deciding whether exhaustion is substantive or nonsubstantive).

45 *See infra* notes 58–70 and accompanying text; *infra* Part II.C.2.

oped antecedents in international or foreign domestic tribunals;[46] it is thus unsurprising that U.S. courts are called upon to fill gaps or decide between different standards or analogies. Consider issues that arise in corporate aiding and abetting cases, such as the appropriate mens rea standard[47] and whether corporate liability is best understood as just one kind of liability for private parties generally based in part on analogies to international criminal law, or whether it is best analogized to the law of state responsibility; these issues were raised in the *Talisman* case in the Second Circuit.[48] Customary international law itself does not provide a clear answer to these questions, and it is unattractive to pretend that it does for the sake of resolving particular ATS cases purportedly on the basis of "pure" international law.

Moreover, because application of international norms in ATS cases may rely in part on uniquely U.S. concerns, acknowledging that U.S. courts are actually applying federal common law is normatively superior because it is more accurate, and because it may help avoid the charge that the United States misunderstands the content and relevant sources of international law.[49] Thus there may be reasons, based on the intentions of Congress, to extend ATS liability to corporations that are relevant only in the context of ATS litigation;[50] similarly, U.S. courts may be authorized to move between criminal and civil liability based on the origins of the ATS itself and on the inferred intentions of Congress rather than on international law standing alone.[51] And, of course, as discussed above, a critical, overarching inquiry in ATS cases—deciding whether the underlying norm meets the requisite level of specificity and universality—is one that is based

46 *See generally* André Nollkaemper, *Internationally Wrongful Acts in Domestic Courts*, 101 AM. J. INT'L L. 760, 795 (2007) ("Since international law determines only general principles, leaves much of the detail of the fashioning of relief to the domestic level, and relies on domestic law to supplement it with necessary detail and to adjust it to the domestic context, different states will inevitably come up with different responses.").

47 *See infra* Part II.C.

48 *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 258–59 (2d Cir. 2009); *see also* Brief of Amicus Curiae Professor Christopher Greenwood, CMG, QC in Support of Defendant-Appellee at 10–28, *Presbyterian Church of Sudan*, 582 F.3d 244 (No. 07-0016), 2007 WL 7073751 [hereinafter Brief of Professor Greenwood] ("[I]nternational law contains no rule extending liability to corporate entities.").

49 *See* John B. Bellinger III, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 42 VAND. J. TRANSNAT'L L. 1, 8 (2009) (noting that the United States is "regarded as something of a rogue actor" because of ATS suits, in part because U.S. courts apply their "own divination of universal law").

50 *See infra* notes 58–70 and accompanying text; *infra* Part III.B.

51 *See infra* Part II.

on how courts understand the intentions of the U.S. Congress with respect to contemporary international law. Finally, acknowledging that the courts are applying U.S. law clarifies ATS issues with respect to prescriptive jurisdiction.[52]

C. *A New Approach to ATS Litigation*

How would this approach work? As already described, *Sosa* itself sets a high standard for the basic types of international claims that can go forward under the ATS, which would not change under this approach. Nor would it change obviously procedural issues governed by the law of the forum. With respect to questions like exhaustion, or corporate and secondary liability, however, this approach would require courts to apply federal common law based on the content and clarity of international law (where international law provides a clear answer, courts should generally apply it), the content of domestic law (because Congress generally legislates with domestic norms as a background[53] and because when the statute was originally enacted there was no sharp separation between international law and the general law[54]), and, in some circumstances, the views of the executive branch as to the content of customary international law, particularly where customary international law is unclear or in a state of flux.[55] Courts should also presume that Congress would be especially keen to avoid any potential *violations* of international law, as in the context of prescriptive jurisdiction;[56] this general rule of statutory interpretation applies with particular force in the ATS context.[57]

More generally, courts should give effect to two important components of the *Sosa* opinion. First, as many commentators have emphasized,[58] the opinion admonishes courts to exercise "vigilant doorkeeping,"[59] restraint, and "caution in adapting the law of nations

52 *See infra* Part IV.

53 *See, e.g.*, United States v. Texas, 507 U.S. 529, 534 (1993) (noting the presumption in favor of retaining common law when interpreting federal legislation); Smith v. United States, 507 U.S. 197, 204 n.5 (1993) ("Congress generally legislates with domestic concerns in mind.").

54 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 714 (2004).

55 *See infra* Part II.C.2.

56 *See infra* Part IV.

57 *See* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); *cf.* Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 900 (2006) (arguing that ATS litigation was intended to fulfill sovereign obligations of the United States, not to redress violations of international law generally).

58 *See, e.g.*, Bellinger, *supra* note 49, at 5.

59 *Sosa*, 542 U.S. at 729.

to private rights."[60] This theme of caution and restraint is a crucial part of the opinion and it led to the defendants' victory; it is also a theme that the Court links in several places back to the inferred intentions of Congress.[61] There is a second, equally important aspect to the intentions of Congress, however: the *Sosa* opinion emphasizes that Americans and members of the Constitutional Convention and the First Congress were preoccupied with,[62] anxious about,[63] and "concern[ed] over the inadequate vindication of the law of nations."[64] The Court refers to the "serious consequences in international affairs" that these violations threatened,[65] as well as their contemporary nature as "'heinous actions'"[66] committed by those who have become "'an enemy of all mankind.'"[67] This aspect of congressional intent (both original and contemporary) is also fundamental to the opinion.[68] It is on this basis that the majority rejects the concurring Justices' view that no contemporary ATS cases should go forward at all; in the view of the majority, the inferred intentions of Congress (both modern and historical) provide the positive source of law that permits federal common law making after *Erie*.[69] The enactment of the ATS

60 *Id.* at 728.

61 *See id.* at 724 ("We think it is correct, then, to assume that the First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations, though we have found no basis to suspect Congress had any examples in mind beyond those torts corresponding to Blackstone's three primary offenses . . . ."); *id.* at 728 ("We have no congressional mandate to seek out and define new and debatable violations of the law of nations . . . .").

62 *See id.* at 715–16.

63 *See id.* at 719.

64 *Id.* at 717.

65 *Id.* at 715.

66 *Id.* at 732 (quoting Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring)).

67 *Id.* (quoting *Tel-Oren*, 726 F.2d at 781 (Edwards, J., concurring)).

68 The Court's reliance on contemporary events to identify the relevant intentions of Congress has been criticized. *See* Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 174.

69 *Sosa*, 542 U.S. at 730–31 ("We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism. Later Congresses seem to have shared our view."). This is also how Justice Scalia's concurring opinion characterizes Justice Souter's majority opinion. *See id.* at 744–45 (Scalia, J., concurring in part and concurring in the judgment). The Court's references to *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), and *The Paquete Habana*, 175 U.S. 677 (1900), might be read as anchoring the federal common law in ATS litigation to the Constitution rather than the intentions of Congress. *See* Texas Indus., Inc. v. Radcliff Materials,

(as understood by the Court in *Sosa*) and subsequent events[70] evince an intent by Congress that specific, universal, and obligatory norms be capable of civil redress in U.S. courts to safeguard international affairs, peace, and the position of the United States in the international community. There are thus two strands of congressional intent at work in the *Sosa* opinion: a limit on the underlying international norms that are actionable under the ATS, coupled with a strong desire to see those norms vindicated in U.S. courts.

The sections below briefly describe in concrete terms how the foregoing analysis would apply in particular contexts and conclude that the likely outcomes are: (a) application of a knowledge standard for aiding and abetting; (b) corporations can be held civilly liable in ATS cases; and (c) only universal jurisdiction offenses are actionable where no other basis for prescriptive jurisdiction exists.[71] Although an exhaustive exploration of these complicated issues is beyond the scope of this article, the overall upshot would be a narrower set of potential ATS cases and claims going forward because of the prescriptive jurisdiction limits;[72] but within those cases, claims against corporations for aiding and abetting liability would be actionable.

II. ACCOMPLICE LIABILITY

This Part and the next analyze the approach advanced in this Article in terms of two significant issues in many contemporary ATS cases: accomplice liability and the liability of corporations. Courts and commentators considering these issues have frequently focused on whether federal common law or international law applies. If interna-

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Inc., 451 U.S. 630, 641 (1981); *see also* Note, *An Objection to* Sosa*—And to the New Federal Common Law*, 119 HARV. L. REV. 2077, 2082 (2006) (noting an area of federal courts' authority that "derives not from any act of Congress, but rather from constitutional implication"). Even if constitutional underpinnings might be seen as an additional source of authority for the development of federal common law in the context of the ATS, the Court's opinion makes clear that congressional authorization is of fundamental significance. *See Sosa*, 542 U.S. at 727. This is the basis for the limitation of ATS claims to international norms that are sufficiently clear and universal. *See id.*

70 *See Sosa*, 542 U.S. at 730–31 (discussing the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2006))).

71 To be clear about the structure of the argument, one might agree that federal common law governs the substantive aspects of ATS litigation, but disagree with this view of congressional intent and/or with the way that the specific issues of secondary and corporate liability are resolved in the following sections.

72 Aside from prescriptive jurisdiction limits, ATS cases should be limited to a narrow set of underlying international offenses because of the Court's reasoning that they must meet a high standard for specificity and universality. *See Sosa*, 542 U.S. at 724.

tional law applies, determining its content has proven difficult in both contexts, in part due to a number of framing issues. For example, many of the relevant cases are criminal; if the question is framed narrowly—whether international law itself provides *civil* aiding and abetting liability for international human rights offenses—the answer seems to be "no," but if the question is framed more broadly, to include international criminal norms, then the answer is more likely to be "yes."[73] As a second example, if the question of corporate liability is framed broadly, in terms of nonstate actors *generally* (does international law impose duties on nonstate actors?), the answer is a qualified "yes,"[74] but if the question is framed specifically in terms of corporations, the answer is more likely to be "no."[75] There are other contested issues, too, including the mens rea standard for aiding and abetting liability. These questions are not definitively answered by customary international law itself; in truth, federal courts in ATS cases are developing both domestic federal law and customary international law as they resolve issues like this in ATS cases.

A. Domestic v. International Law

Neither international law nor domestic common law provides a fully satisfactory source of law for accomplice liability in ATS cases.[76] Applying stand-alone domestic common law—drawn, for example, from the Restatement of Torts[77]—ignores the significance of accomplice liability in determining what conduct is actionable under the

73 Not surprisingly, those who favor restricting or eliminating ATS cases frame the question narrowly, while those in favor of more expansive ATS liability frame the question in broader terms. *Compare* Bradley et al., *supra* note 15, at 929 (suggesting that corporate aiding and abetting liability is improper under the ATS), *with* Keitner, *supra* note 11, at 85–86, 92 (suggesting that international criminal law informs what is actionable civil conduct under the ATS).

74 *See* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 282 (2d Cir. 2007) (Katzmann, J., concurring) ("[The Second Circuit has] repeatedly treated the issue of whether corporations may be be held liable under the ATCA as indistinguishable from the question of whether private individuals may be.").

75 Brief of Professor Greenwood, *supra* note 48, at 10–19.

76 This subpart considers accomplice liability generally (for both individual and corporate defendants). The next section analyzes corporate liability specifically. *See infra* Part II.B.

77 *Khulumani*, 504 F.3d at 287–89 (Hall, J., concurring) (discussing Supreme Court cases relying on the Restatement (Second) of Torts to establish federal common law on aiding and abetting).

ATS. This suggests, as some have reasoned,[78] that the content of international law should be relevant; if international law clearly rejected aiding and abetting liability, for example, this would be a reason to reject ATS cases based on aiding and abetting liability. On the other hand, accomplice liability is relatively undeveloped in international law, in part because it is often left to domestic law or international tribunals themselves to determine its content.[79] Thus, international law itself points toward the development of norms of accomplice liability by domestic legal systems and international tribunals, making its content unclear and undermining the binary approach.[80] For this reason, too, the text of the statute, which refers in part to any "civil action by an alien for tort only, committed in violation of the law of nations"[81] cannot be read to require the application of international law as entirely distinct from domestic law. Standing alone, neither domestic nor international law is a satisfactory source for aiding and abetting norms; it is little wonder that courts have devoted substantial resources in trying to answer this question, only to generate a variety of opinions, none of them fully convincing.[82]

Some courts and commentators have reasoned that because accomplice liability regulates conduct, *Sosa* requires courts to apply

78 *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009) ("Recognition of secondary liability is no less significant a decision than whether to recognize a whole new tort in the first place.").

79 *See infra* Part II.C.1.

80 The district court in *In re South African Apartheid Litigation* reasoned that:

> As the ATCA is merely a jurisdictional vehicle for the enforcement of universal norms, the contours of secondary liability must stem from international sources. Ideally, the outcome of an ATCA case should not differ from the result that would be reached under analogous jurisdictional provisions in foreign nations such as Belgium, Canada, or Spain.

In re S. African Apartheid Litig., 617 F. Supp. 2d 228, 256 (S.D.N.Y. 2009). In fact, international law frequently leaves the details of secondary liability up to the implementing court or jurisdiction, so this reasoning is unpersuasive.

81 28 U.S.C. § 1350 (2006).

82 *See Presbyterian Church of Sudan*, 582 F.3d at 259 (applying international law and a purpose standard); *Khulumani*, 504 F.3d at 277 (Katzmann, J., concurring) (applying international law and a purpose requirement); *id.* at 287–89 (Hall, J., concurring) (applying domestic law and a knowledge requirement); *id.* at 321, 331 (Korman, J., concurring in part and dissenting in part) (reasoning that corporations cannot be held liable, but that if they could be, international law would supply the mens rea standard); Doe I v. Unocal Corp., 395 F.3d 932, 951 (9th Cir. 2002) (applying international law and a mens rea of knowledge), *reh'g en banc granted*, 395 F.3d 392 (9th Cir. 2003), *dismissed*, 403 F.3d 708 (9th Cir. 2005); *id.* at 964 (Reinhardt, J., concurring) (applying domestic law); *In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 256 (applying international law and a knowledge standard).

standards derived entirely from international law.[83] *Sosa* itself did not involve questions of secondary liability, and the Court accordingly held nothing with respect to this issue. Moreover, the Court's reasoning does not suggest that international law must supply the relevant standard just because secondary liability norms regulate conduct. The Court describes the historical understanding of the ATS, concluding that when it was enacted, a few "torts in violation of the law of nations were understood to be within the common law";[84] this historical understanding that the law of nations was part of the common law obviously does not compel the conclusion that modern day international law must supply accomplice liability standards free of any input or development by the federal courts. If anything, it points in the opposite direction, in favor of modern federal common law that includes violations of the law of nations.

The *Sosa* Court then explains how the ATS should be applied in a post-*Erie* world, concluding that courts can recognize causes of actions for violations of international law but should do so only where the claims "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[85] Aiding and abetting claims can *only* be brought if the underlying tort claim (e.g., genocide, torture, war crimes) meets this standard, and in this sense they "rest" on an international norm of this character, but *Sosa* does not suggest that the elements of aiding and abetting liability themselves must meet this high bar. Nor, for that matter, does it suggest that this high standard needs to be met for all questions of international law that arise in ATS cases. Indeed, the reasons it gives for "judicial caution"[86] do not fully apply to secondary liability claims where the underlying norm already meets this high standard. Equally significant, what is most contested in ATS cases is not aiding and abetting liability *itself* (which seems to be generally accepted),[87] but

83 *See Presbyterian Church of Sudan*, 582 F.3d at 259; *Khulumani*, 504 F.3d at 277 (Katzmann, J., concurring); *In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 256; *see also* Corrie v. Caterpillar, Inc., 403 F. Supp. 2d 1019, 1026–27 (W.D. Wash. 2005) (holding specific facts of a claim brought under ATS must violate international norms to be recoverable), *aff'd*, 503 F.3d 974 (9th Cir. 2007); Keitner, *supra* note 11, at 73–83 (discussing accomplice liability under the ATS).

84 Sosa v. Alvarez-Machain, 542 U.S. 692, 720 (2004).

85 *Id.* at 725.

86 *Id.*

87 It seems undisputed that aiding and abetting liability is well established in international criminal law, and the arguments against applying it to the civil context in ATS cases appear weak. *See infra* Part II.B. Apparently no court has rejected aiding and abetting liability as a whole in ATS cases. Some commentators have objected to

instead either one element of the cause of action (state of mind) or corporate liability itself. Nothing about *Sosa* suggests that its universality and specificity requirements apply to every element of the cause of action when the underlying violation meets the high standard, as does aiding and abetting liability itself.

The *Sosa* opinion gives five reasons for "judicial caution." The first two reasons are linked: because the common law is now understood as being made (rather than discovered), federal courts generally apply common law with the implicit or explicit authorization of Congress.[88] But in ATS cases raising aiding and abetting claims, Congress is *already* understood to have permitted a claim based on the underlying conduct—that is, the underlying conduct is undesirable and threatening enough to make it comparable to piracy, violations of safe conducts, and assaults on ambassadors—and even the claim for aiding and abetting liability itself meets this standard. What is most contested are the elements of such a claim, and under both domestic[89] and international law,[90] the details of aiding and abetting liability are frequently left to courts for development. Third, courts must be careful about inferring a private cause of action where Congress has not done so specifically.[91] But there is nothing to infer from the fact that Congress did not explicitly create a cause of action for secondary liability when it did not explicitly create a cause of action for the substantive tort in the first place. And there is even less to infer from the fact that although aiding and abetting liability itself meets the high *Sosa* standard, the state of mind element for that cause of action is not well specified. Thus, once the high bar for recognizing a claim based on international law is met, there is little reason to impose a second high bar to claims of secondary liability, and even less reason to impose a high bar for specific elements of secondary liability claims.

Fourth, the *Sosa* Court noted that potential foreign relations problems may arise in ATS cases that limit foreign governments' treatment of their own citizens.[92] Secondary liability claims are almost uni-

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aiding and abetting cases against corporations, *see, e.g.*, Bradley et al., *supra* note 15, at 924–29, but that is different from arguing against aiding and abetting liability as a whole. Corporate liability is addressed below in Part III.

88 *See Sosa*, 542 U.S. at 725–26.

89 *Cf.* 18 U.S.C. § 2(a) (2006) (criminalizing aiding and abetting generally, but not providing the applicable mens rea). *See generally* Richard C. Mason, *Civil Liability for Aiding and Abetting*, 61 BUS. LAW. 1135, 1139–40 (2006) (noting the "nationwide acceptance of civil liability for aiding and abetting").

90 *See infra* notes 97–111 and accompanying text.

91 *See Sosa*, 542 U.S. at 727.

92 *See id.* at 727–28.

versally brought against private parties, however, not foreign governments themselves, and adopting a federal common law (rather than a pure international law approach) may provide greater opportunity for deference to the executive branch. Recall, too, that under the approach advanced here, ATS claims are subject to the standard international law limitations on prescriptive jurisdiction. Cases for which there is no jurisdictional basis under international law would not go forward.[93] Fifth, the *Sosa* opinion returns to the question of congressional authorization, in particular declarations of non-self-execution,[94] which have nothing specifically to do with secondary liability.

Applying *Sosa*'s heightened standard to aiding and abetting issues also runs counter to the second strand of congressional intent that the *Sosa* Court emphasized: the desire to see certain violations of international law redressed in U.S. courts.[95] Permitting aiding and abetting claims to go forward based on this small set of core international law violations actionable after *Sosa* vindicates this second aspect of congressional intent. Finally, as suggested above, even if the heightened standard from *Sosa* applies to secondary liability, aiding and abetting itself meets that standard, thus expanding liability to a new set of defendants. Thus, under either view, aiding and abetting liability claims can go forward, the only question is whether *Sosa*'s high standard applies to each element of the claim, including state of mind. The question of the required state of mind is frequently delegated to international courts and tribunals or to domestic implementation; under these circumstances it makes little sense to require a high degree of consensus within international law itself.

B. Accomplice Liability and Federal Common Law

Although *Sosa*'s high requirements of specificity and universality should not apply to accomplice liability issues, international law is nonetheless relevant to determining the scope and content of accomplice liability in ATS cases. Turning specifically to aiding and abetting liability, courts should recognize that such liability itself is well established in international criminal law,[96] although the precise mens rea standard is not. Courts should accordingly permit aiding and abetting

93 *See infra* Part IV.

94 *See Sosa*, 542 U.S. at 728.

95 *See supra* notes 63–70 and accompanying text.

96 Even those who seek to limit the scope of ATS liability generally concede that aiding and abetting liability is recognized in international criminal law. *See* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 270 (2d Cir. 2007) (Katzmann, J., concurring) ("Indeed, the United States concedes, and the defendants do not dispute, that the concept of criminal aiding and abetting liability is 'well established' in

claims in ATS cases and acknowledge that they are developing federal common law and customary international law with respect to the mens rea requirement. There are several potential objections. First, as discussed and rejected above, one could argue that *Sosa*'s high standard applies here.

Second, aiding and abetting liability is well established in international law in the *criminal* context, but not necessarily the civil. The ATS itself, however, as understood in *Sosa*, provided civil remedies for criminal conduct that violated the law of nations.[97] Moreover, the Court seemed unconcerned about moving between criminal conduct and civil liability in both its discussion of the origins of the ATS[98] and in its suggestion that torture cases could go forward under the standard it had set out.[99] Justice Breyer made the link between contemporary international criminal law and civil remedies explicit; as he points out, civil and criminal liability are closely linked in civil law jurisdictions.[100] Note, however, that international law itself does not clearly provide for aiding and abetting in civil cases—it is more accurate to understand this as federal common law of the United States informed by the content of international law than a direct application of international law. A third potential objection is that the Court has refused in at least one case to imply a cause of action for aiding and abetting where the statute in question did not provide for such liability.[101] *Central Bank of Denver v. First Interstate Bank of Denver*,[102] however, interpreted the Securities Exchange Act, a statute that prohibited certain conduct, but not aiding and abetting.[103] The ATS is not analogous because its text does not itself prohibit any particular conduct, so there is nothing to infer from the failure to include aiding and abetting as prohibited conduct. A second distinction is that the ATS,

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international law." (quoting Brief for the United States as Amicus Curiae at 21, *Khulumani*, 504 F.3d 254 (No. 05-2326))); Bradley et al., *supra* note 15, at 927.

97 *See* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 480 (1989); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221, 226, 228 (1996).

98 *See Sosa*, 542 U.S. at 715–17.

99 *See id.* at 731 (discussing Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980)).

100 *See id.* at 762–63 (Breyer, J., concurring in part and concurring in the judgment).

101 *See, e.g.*, Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 191 (1994); *see also* Bradley et al., *supra* note 15, at 926–27 (also making this argument).

102 511 U.S. 164.

103 *See id.* at 173–75 (emphasizing repeatedly that the text of the statute controls the Court's inquiry).

unlike the Securities Exchange Act, is tied to the changing content of customary international law. When courts in ATS cases permit aiding and abetting claims to go forward they do so because customary international law contemplates such liability and because the statute itself is specifically tied to conduct that violates international law.

C. Mens Rea

Courts have recognized aiding and abetting liability in ATS cases, which is consistent with the foregoing analysis, but they have frequently done so by purporting to apply international law directly, not as part of federal common law.[104] This has created difficulty for the question of mens rea. International criminal tribunals have applied a knowledge standard in most cases,[105] yet the Rome Statute for the

104 *See, e.g.*, Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009); Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 264 (2d Cir. 2007) (Katzmann, J. concurring); Doe I v. Unocal Corp., 395 F. 3d 932, 947–53 (9th Cir. 2002), *reh'g en banc granted*, 395 F.3d 392 (9th Cir. 2003), *dismissed*, 403 F.3d 708 (9th Cir. 2005); *In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 250 (S.D.N.Y. 2009); *cf.* Cabello v. Fernández-Larios, 402 F.3d 1148, 1158–59 (11th Cir. 2005) (applying aiding and abetting liability without clearly specifying the source of law). Opinions that do analyze aiding and abetting as part of federal common law do so for different reasons and by considering different factors than those advanced here. *See Khulumani*, 504 F.3d at 284 (Hall, J., concurring); *Unocal*, 395 F.3d at 963 (Reinhardt, J., concurring).

105 *See, e.g.*, Prosecutor v. Sesay, Case No. SCSL-04-15-A, Appeals Judgment, ¶¶ 546–49 (Oct. 26, 2009); Prosecutor v. Fofana, Case No. SCSL-04-14-A, Appeals Judgment, ¶¶ 366–67 (May 28, 2008); Prosecutor v. Brima, Case No. SCSL-04-16-A, Appeals Judgment, ¶¶ 242–43 (Feb. 22, 2008); Prosecutor v. Simic, Case No. IT-95-9-A, Appeals Judgment, ¶ 86 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 25, 2006); Prosecutor v. Kvocka, Case No. IT-98-30/1-A, Appeals Judgment, ¶ 89 (Int'l Crim. Trib. for the Former Yugoslavia Feb 28, 2005); Prosecutor v. Ntakirutimana, Case No. ICTR-96-17-T-A, Appeals Judgment, ¶ 364 (Dec. 13, 2004); Prosecutor v. Blaškic, Case No. IT-95-14-A, Appeals Judgment, ¶ 50 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004); Prosecutor v. Ndindabahizi, Case No. ICTR-2001-71-I, Judgment and Sentence, ¶ 457 (July 15, 2004); Prosecutor v. Vasiljevic, Case No. IT-98-32-A, Appeals Judgment, ¶ 102 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 25, 2004); Prosecutor v. Krnojelac, Case No. IT-97-25-A, Appeals Judgment, ¶ 51 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003); Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment, ¶¶ 387–89 (May 15, 2003); Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgment, ¶ 32 (June 7, 2001); Prosecutor v. Kayishema, Case No. ICTR-95-1-A, Appeals Judgment, ¶ 198 (June 1, 2001); Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgment, ¶ 162 (Int'l Crim. Trib. for the Former Yugoslavia March 24, 2000); Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment, ¶¶ 180–81 (Jan. 27, 2000); Prosecutor v. Tadic, Case No. IT-94-1-A, Appeals Judgment, ¶¶ 200, 229 (July 15, 1999); Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶¶ 245–49 (Dec. 10, 1998); Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶¶ 537–45 (Sept. 2, 1998); Trial of Bruno Tesch and Two Others (Zyklon B

International Criminal Court appears to adopt a purpose standard for at least some secondary offenses,[106] although it is unclear precisely what this standard will mean in practice,[107] and its significance for customary international law as a whole is disputed.[108] Some international conventions on human trafficking also appear to adopt the higher purpose standard.[109] Many treaties and the statutes establishing the ad hoc criminal tribunals provide for some kinds of accomplice liability for the conduct actionable in ATS cases, but without

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Case), 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93 (1947); Trial of Wagner and Six Others, 3 LAW REPORTS OF TRIALS OF WAR CRIMINALS 23, 40–42, 94–95 (1946); Trial of Werner Rohde and Eight Others, 5 LAW REPORTS OF TRIALS OF WAR CRIMINALS 54 (1946). *But see* United States v. von Weizsaecker (Ministries Case), *in* 14 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 662 (1949); *Draft Code of Crimes Against the Peace and Security of Mankind*, [1996] 2 Y.B. Int'l L. Comm'n., ch. 2, arts. 2(3)(d), 17, 18, 20, U.N. Doc. A/CN.4/SER.A/1996/Add.l.

106 *See* Rome Statute of the International Criminal Court art. 25, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; Andrea Reggio, *Aiding and Abetting in International Criminal Law: The Responsibility of Corporate Agents and Businessmen for "Trading with the Enemy" of Mankind*, 5 INT'L CRIM. L. REV. 623, 647 (2005).

107 *See* Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. U. J. INT'L HUM. RTS. 304, 315–16 (2008).

108 *See* Keitner, *supra* note 11, at 86–87 (noting that the Rome Statute does not recognize official immunity defenses and reasoning that this may have caused the drafters to restrict aiding and abetting liability more than customary international law itself does).

109 *See* Council of Europe, Convention on Action Against Trafficking in Human Beings art. 21, May 16, 2005, C.E.T.S. No. 197 [hereinafter Council of Europe, Trafficking Convention] ("Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences when committed intentionally, aiding or abetting the commission of any of the offences established in accordance with Articles 18 and 20 of the present Convention."); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex II, art. 5, U.N. Doc. A/RES/55/25 (Jan. 8, 2001) [hereinafter U.N. Protocol] (requiring criminalization of accomplice liability, apparently for intentional conduct); *see also* Convention on the Safety of United Nations and Associated Personnel art. 9, Dec. 9, 1994, 2051 U.N.T.S. 394. The International Convention on the Suppression and Punishment of the Crime of Apartheid art. III, Nov. 30, 1973, 1015 U.N.T.S. 243, provides international criminal liability for those who "directly abet, encourage, or co-operate in the commission of the crime of apartheid" regardless of the motive involved. Outside the human rights context, the United Nations Convention Against Transnational Organized Crime appears to require the criminalization of intentional aiding and abetting of the laundering of proceeds of the crime. *See* United Nations Convention Against Transnational Organized Crime art. 6, Nov. 15, 2000, 2237 U.N.T.S. 319; International Convention for the Suppression of Terrorist Bombings art. 2(3)(c), G.A. Res. 164, U.N. GAOR, 52d Sess. Supp. No. 49, U.N. Doc. A/52/49, at 389 (Jan. 8, 1998).

specifying the applicable mens rea.[110] In these contexts, mens rea is an issue that has been and continues to be developed through international criminal tribunals or which is sometimes left to the domestic implementation of treaties by legislatures or courts.[111] In light of both the uncertainty and the delegation, courts should accordingly acknowledge that with respect to mens rea in aiding and abetting cases, they are developing a federal common law based on international law. The following sections explain how courts should choose the appropriate state of mind standard in ATS cases.

1. Delegation and State of Mind

In picking the applicable standard for state of mind, the following considerations are relevant. First, as described above, there is some support for *either* knowledge *or* purpose as the standard under

110 Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of the Democratic Kampuchea, as amended, Reach Kram No. NS/RKM/1004/006, Oct. 27, 2004, art 29 (Cambodia) [hereinafter Law on the Establishment of the Extraordinary Chambers]; Statute of the Special Court for Sierra Leone art. 6(1) (2000); Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, art. 3, U.N. GAOR, 54th Sess., U.N. Doc. A/54/49 (May 25, 2000); Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, Annex, art. 6(1), U.N. Doc. S/RES/955 (Nov. 8, 1994); Inter-American Convention on Forced Disappearance of Persons art. 1(b), June 9, 1994, 33 I.L.M. 1529, 1530; Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 7(1), U.N. Doc. S/RES 827 (May 25, 1993); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 4, Dec. 10, 1984, 1465 U.N.T.S. 85; Convention on the Prevention and Punishment of the Crime of Genocide art. 3, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277; Report of the International Law Commission, *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, [1950] 2 Y.B. Int'l L. Comm'n, 377, U.N. Doc. A/CN. 4/SER.A/1950/Add.1; *see also* International Convention for the Protection of All Persons from Enforced Disappearance art. 6, G.A. Res. 61/177, U.N. Doc. A/61/488 (Dec. 20, 2006) (not yet in force). The Geneva Conventions do not provide for accomplice liability for grave breaches, but domestic statutes implementing them sometimes do. *See, e.g.*, 18 U.S.C. § 2 (2006) (aiding and abetting); 18 U.S.C. § 2441 (2006) (war crimes); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field arts. 49–50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

111 This kind of delegation is made explicit in the United Nations Convention against Corruption, which provides in Article 27 that "[e]ach State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with this Convention." United Nations Convention Against Corruption, G.A. Res. 58/4, art. 27, U.N. Doc. A/RES/58/4 (Oct. 31, 2003).

customary international law. In terms of evidence of customary international law, most treaties leave the mens rea requirement open (but a few require purpose), while most international criminal tribunals apply a knowledge standard.[112]

Second, and also mentioned above, treaties and the U.N. Security Council resolutions creating the ad hoc criminal tribunals generally do not specify mens rea, effectively delegating the issue to either domestic implementing bodies or the tribunals themselves.[113] The International Criminal Tribunal for Rwanda, for example, applied a mens rea of knowledge for complicity in the form of aiding and abetting, based on the Rwandan Penal Code, English law, and the Eichmann trial in Israel.[114] The U.S. statute[115] implementing the

112 *See supra* notes 105–10 and accompanying text.

113 *See supra* note 110. *See generally* Beth Van Schaack, *Atrocity Crimes Litigation: 2008 Year-in-Review*, 7 NW. U. J. INT'L HUM. RTS. 170, 175 (2009) (describing the work of international criminal tribunals (which are a primary source of authority for determining the mens rea standard in ATS cases) as "refashioning" international criminal law "by more precisely identifying the elements of international crimes, forms of responsibility, defenses, and other penal doctrines; and by adding content to customary international law concepts and vaguely-worded treaty provisions"); Andrew T. Guzman & Timothy L. Meyer, *Explaining Soft Law* (Univ. of Cal., Berkeley Pub. Law Research Paper No. 13534444, 2009), *available at* http://ssrn.com/abstract=1353444 (arguing that soft law can, in other contexts, be best understood in terms of delegation). "Delegation" is sometimes used to describe a transfer of legislative power from the United States to international institutions which include authority to create norms that are in some sense binding. *See, e.g.*, Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1502–35 (2002). Delegation is used here to describe the situation in which a treaty or other regime allows tribunals or domestic implementation to resolve issues that are left open. This form of delegation does itself not create norms that are binding on other parties, and to the extent it allows each country to implement norms with different content, it does not transfer power away from states but instead leaves greater discretion to them.

114 Prosecutor v. Ntakirutimana, Case Nos. ICTR-96-10-A & ICTR-96-17-A, Appeals Judgments, ¶ 364 (Dec. 13, 2004); Prosecutor v. Ndindabahizi, Case No. ICTR-2001-71-T, Judgment, ¶ 457 (July 15, 2004); Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment, ¶¶ 387–89 (May 15, 2003); Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T Judgment, ¶ 32 (June 7, 2001); Prosecutor v. Kayishema, Case No. ICTR-95-1-A, Appeals Judgment, ¶ 198 (June 1, 2001); Prosecutor v. Musema, Case No. ICTR-96-13-A, Appeals Judgment, ¶¶ 180–81 (Jan. 27, 2000); Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶¶ 537–45 (Sept. 2, 1998). Similarly, the statute establishing the Extraordinary Chambers in the Courts of Cambodia provides for aiding and abetting liability but does not specify a mens rea. *See* Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of the Democratic Kampuchea, Reach Kram No. NS/RKM/1004/006, 2004, at. 29 (Cambodia). The indictment of Kaing Guek Eav from the Office of the Co-Investigating Judges used knowledge. *See* Kaing Guek Eav ("Duch"), Case No. 001/18-07-2007-ECCC/TC, Closing Order Indicting Kaing Guek

Convention against Torture (which requires states to criminalize "complicity or participation in torture")[116] provides liability for conspiracy,[117] and a separate section of the U.S. criminal code would allow for aiding and abetting prosecutions, without specifying mens rea.[118] The International Criminal Tribunal for the former Yugoslavia applied a knowledge standard based on its view of customary international law, derived in part from Nuremburg cases.[119]

The issue of mens rea has thus largely been delegated to domestic law or to the development of soft or customary international law. In either case, this delegation by international law to international tribunals or to domestic law strongly supports the application of domestic mens rea standards in domestic cases that are based on international law, especially domestic *civil* cases (because these uncertain norms are being translated into a slightly different context), and where the domestic law standard is consistent with some sources of customary international law. In the United States, domestic common law applies purpose in some criminal contexts,[120] but a knowledge standard in civil cases.[121] This domestic civil standard of knowledge is

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Eav alias Duch, ¶ 161 (Feb. 21, 2003). Although the defense contested the application of joint criminal enterprise liability and other issues, it did not object to the legal standard for aiding and abetting. *See* Kaing Guek Eav ("Duch"), Case No. 001/18-07-2007-ECCC/TC, Final Defence Written Submissions, ¶¶35–36 (Nov. 11, 2009).

115 18 U.S.C. § 2340A (2006).

116 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 4, adopted Dec. 10, 1984, 108 Stat. 382, 85 U.N.T.S. 1465.

117 18 U.S.C. § 2340A(c).

118 *Id.* § 2.

119 Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶¶ 245–49 (Dec. 10, 1998).

120 *See, e.g.*, United States v. Morrow, 177 F.3d 272, 286 (5th Cir. 1999); MODEL PENAL CODE § 2.06(3)(a) (1985).

121 *See, e.g.*, Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 286 (2d Cir. 2007) (Hall, J., concurring); RESTATEMENT (SECOND) OF TORTS § 876(b) (1977); Mason, *supra* note 89, at 1146–53; *see also* Nilay Vora, *Federal Common Law and Alien Tort Statute Litigation: Why Federal Common Law Can (and Should) Provide Aiding and Abetting Liability*, 50 HARV. INT'L L.J. 195, 219–21 (2009) (arguing that federal law provides for aiding and abetting liability under the ATS). Note that treaties are not very specific about actus reus requirements. *See Khulumani*, 504 F.3d at 77 (Katzmann, J., concurring). Moreover, there is a relationship between the mens rea and actus reus standards. *See In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 256 (S.D.N.Y. 2009) (applying a knowledge standard but dismissing many claims based on fairly stringent actus reus test); RESTATEMENT (SECOND), *supra*, § 876 cmt. d; Nathan Isaac Combs, *Civil Aiding and Abetting Liability*, 58 VAND. L. REV. 241, 267–78 (2005). These two points support the overall argument advanced here: it makes little sense to view the domestic courts' application of aiding and abetting liability as purely a matter of international law, for that law leaves a number of issues unresolved.

a third factor that weighs in favor of applying a knowledge standard in ATS cases. One might argue that instead of being delegated, the state of mind requirement under customary international law is just uncertain or in a state of development. The foregoing evidence clearly points to some level of delegation, however, probably generated in part by the uncertainty or the failure of treaty-makers to reach agreement.[122]

Some opinions in ATS cases have adopted a purpose standard. In his concurring opinion in *Khulumani v. Barclay National Bank*,[123] for example, Judge Katzmann concluded that a purpose standard should be applied based on international law,[124] and the Second Circuit adopted this reasoning in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*[125] Judge Katzmann acknowledged that some authority pointed toward a knowledge standard; he picked purpose based on *Sosa*'s specificity and universality test, reasoning that cases applying the knowledge standard would also find liability under the purpose standard, making the later preferable.[126] For the reasons articulated above, however, *Sosa*'s specificity and universality standard does not apply to accomplice liability at all.[127]

Even if it did, aiding and abetting meets this standard, and the very treaties and other sources that establish aiding and abetting liability in international law also, in the main, permit delegation of the mens rea standard to domestic implementation or development by the courts. Application of the universality and specificity standard thus permits domestic variation with respect to state of mind, making application of the knowledge standard preferable in U.S. ATS cases. Finally, note that if Judge Katzmann's view prevails, it underscores a primary claim of this Article: that international law applied in ATS cases is best understood as federal common law, because its content is shaped by concerns that are unique to the United States (here, the high *Sosa* standard for specificity and universality).

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122 Arguably there may be less reason to defer to the executive branch if the state of mind issue has been entirely delegated to domestic implementation or to international tribunals. Treaties are generally implemented by the legislature rather than the President acting alone. And if the issue were always delegated to domestic law, then there would likely be no development of customary international law qua customary international law; for matters of domestic law, the case for deference to the executive branch is much more limited.

123 504 F.3d at 264 (Katzmann, J., concurring).

124 *See id.* at 270–77.

125 582 F.3d 244, 258 (2d Cir. 2009).

126 *See Khulumani*, 504 F.3d at 277 (Katzmann, J., concurring).

127 *See supra* Part II.A.

2. Deference to the Executive Branch

Under some circumstances, courts in ATS cases should give modest deference to the views of the executive branch as to what the content of customary international law should be, especially when that law is still in development.[128] This deference is distinct from case-by-case deference to the executive branch as to the foreign affairs implications of allowing the case itself to go forward;[129] this Article expresses no opinion about that kind of deference.[130] The deference defended here is to the executive branch's view on the content and development of customary international law.

The ATS is best understood after *Sosa* as delegating to the courts the power to make limited federal common law based on international law, as discussed above. In general, where the courts are involved in the development of domestic federal common law, there is no particular reason to defer to the executive branch.[131] In ATS cases, however, domestic litigation has a two-fold relationship to customary international law: the courts must interpret customary international law as they develop federal common law and the courts' opinions themselves may contribute to the formation of customary international law.[132] That is, on the latter point, other countries and international actors may look to these U.S. decisions as evidence of the content of international law,[133] and it is appropriate that the executive

128 *See* Christiana Ochoa, *The Individual and Customary International Law Formation*, 48 VA. J. INT'L L. 119, 125–26, 132–34 (2007) (discussing the formation of customary international law generally).

129 *See* Beth Stephens, *Judicial Deference and the Unreasonable Views of the Bush Administration*, 33 BROOK. J. INT'L L. 773, 789–92 (2008) (describing and evaluating this kind of deference in ATS cases).

130 There are other potential reasons to defer to the executive branch; for example, as part of the political question doctrine, the deference advanced here is just to the role of the executive branch in the formation of customary international law in ATS cases. *See generally* Ingrid Brunk Wuerth, *The Dangers of Deference: International Claim Settlement by the President*, 44 HARV. INT'L L.J. 1 (2003) (criticizing deference to the executive branch in certain contexts).

131 *See* Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 707–08 (2000) (noting that if customary international law is viewed as federal common law authorized by Congress, the basis for shifting the delegation to the executive branch is unclear).

132 *See* Anthea Roberts, *Comparative International Law* 17–23 (unpublished manuscript) (on file with author).

133 *See* Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14) (separate opinion of Judges Higgins, Kooijmans, and Buergenthal); Prosecutor v. Furundija, Case No. IT-9S-17/1-T, Judgment (Dec. 10, 1998) (citing Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980)); Sarah H. Cleveland, *The Alien Tort Statute, Civil Society, and Corporate Responsibility*, 56 RUTGERS L. REV. 971,

branch should be given some deference,[134] based on its expertise and informational advantages,[135] as well as its general role in the formation of customary international law[136] and its related function as bearing the primary responsibility for treaty negotiation.[137] Where the executive branch can demonstrate a strong interest in (or prior position with respect to) the formation of a particular norm of customary international law, deference is especially appropriate.

975–80 (2004); Keitner, *supra* note 11, at 100; Roberts, *supra* note 132, at 19–20; *see also* Statute of the International Court of Justice art. 38, June 26, 1945, SS Stat. 1055, 1060 (directing the Court to apply "international custom" and "judicial decisions," the latter as "subsidiary means for the determination of rules of law"); ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 10 (2005) (citing domestic court decisions as evidence of custom); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 52 (7th ed. 2008) (same); 1 OPPENHEIM'S INTERNATIONAL LAW 26 (9th ed. 1992) (same); MALCOM N. SHAW, INTERNATIONAL LAW 78 (5th ed. 2003) (same); Int'l L. Ass'n, Comm. on Formation of Customary (Gen.) Int'l L., Statement of Principles Applicable to the Formation of General Customary International Law 30 (2000), *available at* http://www.ila-hq.org/en/committees/index.cfm/cid/30 (follow "Conference Report London 2000" hyperlink).

134 *Cf.* Bellinger, *supra* note 49, at 8 ("When courts do consider customary international law, there is also a risk that their interpretations could be in tension with those advanced internationally by the executive branch."); Bradley, *supra* note 131, at 707–09 (discussing policy reasons for deference to the executive branch as to the content of customary international law); Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1261 (2007) (suggesting deference to the executive branch with respect to the interpretation of customary international law, in part because "the political branches of the United States play no well-defined role in the lawmaking process").

135 *See* Ku & Yoo, *supra* note 68, at 181–99 (emphasizing the competence and informational superiority of the executive branch over the courts, as well as its political accountability).

136 *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 432–33 (1964) ("When articulating principles of international law in its relations with other states, the executive branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns."); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2084 n.150 (2005) (reasoning that deference to the executive branch is warranted with respect to customary international law, described as "an amorphous and evolving body of law, the content of which has always been informed by political discretion and national self-interest"); Louis Henkin, *The Power of the Executive Branch of the United States Government to Violate Customary International Law*, 80 AM. J. INT'L L. 913, 921–22 (1986) (emphasizing in the context of customary international law "[t]he President's special role in the United States Government, including the conduct of the nation's foreign relations" and that "[t]he President sits at the intersection of the domestic and international responsibilities of the United States").

137 *See* H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 558–60 (1999).

On the other hand, little deference should be afforded to the executive branch in ATS cases as to the interpretation of customary international norms that are already well developed or aspects of ATS litigation with little relationship to customary international law. For example, if the executive branch argued against aiding and abetting liability as a whole in ATS cases, courts should afford this position little deference because it contradicts well-established customary international law.[138] Nothing prevents the executive branch from advocating at the international level for a reversal of this rule, of course, but courts cannot disregard the content of established rules of customary international law without undercutting the ATS itself. Affording deference to the executive branch with respect to customary international law that is unclear or in a state of development may, in turn, influence the development of federal common law by the courts, but the deference is based on the executive's role in developing customary international law not on a direct role for the executive branch in domestic lawmaking. Finally, note that in this context *violations* of customary international law are not an issue—international law does not compel states to adopt either knowledge or purpose as the mens rea.[139]

Deferring to the executive branch has a number of potential costs, including the possibility of inconsistent positions over time (in part due to changes in administration), inconsistent positions from one case to another, potential pressure by foreign governments and corporations on the executive branch,[140] and difficulties that may arise when the government does not choose to express an opinion.[141] These problems are familiar from the foreign sovereign immunity context, in which deference to the executive branch proved undesirable in cases that raised questions about the immunity of foreign sovereigns,[142] and the Foreign Sovereign Immunities Act of 1976[143] was eventually enacted.

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138 Admittedly, this line will not always be easy to draw.

139 Consistent with the *Charming Betsy* canon, courts should interpret the ATS to avoid violations of customary international law. In a situation where deference to the executive branch and the *Charming Betsy* canon point in opposite directions, courts should generally apply the canon. *See* Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the* Charming Betsy *Canon*, 46 B.C. L. REV. 293, 338–50 (2005).

140 *See* Bellinger, *supra* note 49, at 11.

141 *See* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 487 (1983); Bellinger, *supra* note 49, at 11.

142 *See Verlinden*, 461 U.S. at 486; *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong. 26–27 (1976) (statement of Monroe

But in the foreign sovereign immunity context, the executive branch made case-by-case decisions about the desirability of immunity for particular parties.[144] The problems created by this kind of deference are highlighted by the Republic of South Africa's change of position in *In re South African Apartheid Litigation.*[145] Initially South Africa strongly opposed the litigation[146] and sought the assistance of the State Department, which filed a Statement of Interest urging the court to dismiss the litigation.[147] Then, however, there was a change of administration in South Africa[148] and the litigation was narrowed somewhat when some claims were dismissed;[149] South Africa now formally supports the cases.[150] These difficulties are minimized when deference is afforded not with respect to the outcome of particular cases, but as to formation and development of customary international law; for example, the appropriate mens rea in aiding and abetting cases,[151] as a matter of customary international law. This would limit the kind of pressure foreign governments could bring to bear on the executive branch in particular cases (at least in this context). Inconsistency between cases would diminish the deference courts should afford the executive branch, at least to the extent the inconsistency suggested that the executive branch was using deference to achieve desired outcomes in particular cases.

Leigh, Legal Advisor, U.S. Dep't of State). *See generally* G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 134–40 (1999) (discussing the early twentieth-century shift from courts applying customary international law in foreign sovereign immunity cases to deferring to the executive branch).

143 Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. § 1330 (2006)).

144 *See, e.g., Ex parte* Republic of Peru, 318 U.S. 578, 586–90 (1943).

145 617 F. Supp. 2d 228 (S.D.N.Y. 2009).

146 Declaration by Justice Minister Penuell Maduna on Apartheid Litigation in the United States, July 11, 2003 [hereinafter Declaration by Justice Minister Penuell Manduna], *available at*: http://www.info.gov.za/view/DownloadFileAction?id=70180.

147 *In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 276–77 (describing the U.S. government's statement of interest).

148 *See* David Glovin & Mike Cohen, *South Africa Backs GM, Ford, IBM Apartheid Lawsuit (Update 1)*, BLOOMBERG, Sept. 3, 2009, http://www.bloomberg.com/apps/news?pid=20601116&sid=A2xm_iMWNc7g.

149 *In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 243–45.

150 *See* Glovin & Cohen, *supra* note 148.

151 To be clear, case-by-case deference might be appropriate under certain circumstances, an issue beyond the scope of this Article, but the type of deference at issue here is different.

III. CORPORATE LIABILITY

ATS cases are frequently brought against corporations,[152] in part because states that perpetrate human rights abuses are generally immune from suit.[153] Some courts have apparently concluded that where international law generally imposes a duty on nonstate actors with respect to certain conduct (such as war crimes, piracy, and genocide),[154] corporations, as one kind of nonstate actor, can be held liable for such conduct.[155] Defendants and others have argued that international law does not attribute liability to corporations at all.[156] Plaintiffs and some commentators reason that U.S. law determines who is liable, while international law governs the legality of the actual conduct.[157] As this Article went to press, the Second Circuit adopted the defendants' position: corporations are not liable under ATS because international law does not impose duties directly on corporations.[158]

A. Domestic v. International Law

As with accomplice liability, the choice between domestic and international law is not a satisfactory one, although for slightly differ-

152 *See* Curtis A. Bradley, *State Action and Corporate Human Rights Liability*, 85 NOTRE DAME L. REV. 1823 (2010).

153 *See* Roger P. Alford, *Arbitrating Human Rights*, 83 NOTRE DAME L. REV. 505, 509–11 (2008); Paul B. Stephan, *A Becoming Modesty—U.S. Litigation in the Mirror of International Law*, 52 DEPAUL L. REV. 627, 645–46 (2002).

154 *See* Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir. 1995).

155 *See* Flores v. S. Peru Copper Corp., 414 F.3d 233, 247 (2d Cir. 2003); Bigio v. Coca-Cola Co., 239 F.3d 440, 447 (2d Cir. 2000); Doe v. Unocal Corp., 963 F. Supp. 880, 891–92 (C.D. Cal. 1997), *aff'd in part, rev'd in part*, 395 F.3d 932, 949 (9th Cir. 2002), *reh'g en banc granted*, 395 F.3d 392 (9th Cir. 2003), *dismissed*, 403 F.3d 708 (9th Cir. 2005); *see also* Abdullahi v. Pfizer, Inc., 562 F.3d 163, 188 (2d Cir. 2009) (describing where a private actor may be held liable under the ATS); Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 282–83 (2d Cir. 2007) (Katzmann, J., concurring) (stating that liability is not limited to state actors); Harold Hongju Koh, *Separating Myth from Reality About Corporate Responsibility Litigation*, 7 J. INT'L ECON. L. 263, 265 (2004) ("As history and precedent make clear, corporations can be held liable [under international law] . . . particularly when they are involved in *jus cogens* violations.").

156 *See, e.g.*, Brief of Professor Christopher Greenwood, *supra* note 48, at 19; Brief of Professor James Crawford as Amicus Curiae in Support of Defendant-Appellee at 6, Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009) (No. 07-0016).

157 *See, e.g.*, Richard L. Herz, *The Liberalizing Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement*, 21 HARV. HUM. RTS. J. 207, 214–15 (2008); Keitner, *supra* note 11, at 72 (stating U.S. law should determine "the type of entity against which a claim can be asserted").

158 Kiobel v. Royal Dutch Petrol. Co., 621 F.3d 111, 145–49 (2d Cir. 2010).

ent reasons. The effort by some commentators and plaintiffs' lawyers to distinguish "conduct-regulating" norms on the one hand (to which international law would apply), from the type of defendant involved on the other hand (to which domestic law would apply), is not fully convincing.[159] For example, international law seems indisputably relevant to the question of whether private actors as a group can be held liable—no one appears to argue that corporations can be held directly liable for conduct such as torture that is only actionable when engaged in by state actors. So in broad terms at least, international law determines the kind of defendant to whom liability can be attributed. Similarly, if international criminal law and tribunals did impose sanctions on corporations as they do on private individuals,[160] it is hard to see why this would not work in favor of imposing ATS liability on corporations.

On the other hand, the duties of corporations are an increasingly unsettled area of international law,[161] and using domestic law to hold companies liable for conduct that violates international norms may be consistent with the development of customary international law in this area.[162] Moreover, corporations are one kind of nonstate actor, and international law now directly imposes duties on at least some nonstate actors.[163] Although corporate liability is frequently rejected in

159 *See* Keitner, *supra* note 11, 72–82. Indeed, some advocates of the "conduct regulating approach" reach the opposite conclusion: international law applies to the question of corporate liability. *See* Brief of Professor Christopher Greenwood, *supra* note 48, at 2–6, 19–27.

160 *See* Organisation for Economic Co-operation and Development, Country Reports on the Implementation of the OECD Anti-Bribery Convention, http://www.oecd.org/document/24/0,2340,en_2649_34855_1933144_1_1_1_1,00.html (last visited Apr. 5, 2010).

161 *See* Alford, *supra* note 153, at 513–14; Cassell, *supra* note 107, at 317; Ratner, *supra* note 42, at 487–88. Although most human rights conventions do not provide for corporate liability, at least one very recent convention does so. *See* Council of Europe, Trafficking Convention, *supra* note 109, art. 22 (providing both civil and criminal liability for corporations). For a discussion of other international conventions that impose (or require the imposition of) liability on corporations, particularly in the labor, environmental, and financial corruption contexts, see Ratner, *supra* note 42, at 477–86. Canada has recently enacted legislation criminalizing some corporate human rights violations. *See* W. Cory Wanless, *Corporate Liability for International Crimes Under Canada's Crimes Against Humanity and War Crimes Act*, 7 J. INT'L CRIM. JUST. 201, 206–07 (2009).

162 *See* John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010).

163 *See* John H. Knox, *Horizontal Human Rights Law*, 102 AM. J. INT'L L. 1, 27–30 (2008).

international criminal law because many domestic legal systems do not impose criminal liability on corporations, this reasoning does not apply in the civil context.[164] Finally, it is not clear that requiring plaintiffs to show that international law itself imposes a duty on a particular type of nonstate actor best effectuates the intentions of Congress. That is, having decided with the ATS to permit federal courts to hear tort claims for certain kinds of conduct committed by nonstate actors—piracy, violations of safe conducts, and assaults on ambassadors—would Congress have intended to limit liability based on corporate form?[165]

The Second Circuit concluded in *Kiobel* that customary international law, not domestic law, governs whether or not corporations can be held liable under the ATS as one kind of nonstate actor.[166] The court reasoned that the ATS leaves "the question of the nature and scope of liability—who is liable for what—to customary international law"[167] and "whether a defendant is liable under the ATS depends entirely upon whether a defendant is subject to liability under international law."[168] Finding little evidence that international law imposes duties directly on corporations, the court concluded that corporations cannot be sued under the ATS.[169] The insistence that international law standing alone determines the scope of liability under the ATS is

164 *See generally* Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law over Legal Persons: Lessons Learned from the Rome Conference on an International Criminal Court*, *in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 139, 146–58 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

165 Some dicta in *Sosa* could be understood as addressing the choice of law question: "A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004). This language could be understood as suggesting that international law should apply specifically to the issue of corporate liability, or it might be understood as saying that international law determine whether private actors generally may be held liable. *See id.* at 760 (Breyer, J., concurring) (stating that the norm of international law must "extend liability to the type of perpetrator (*e.g.*, a private actor) the plaintiff seeks to sue"). In any event, this language is dicta as the *Sosa* case did not involve a corporate defendant.

166 Kiobel v. Royal Dutch Petrol. Co., 621 F.3d 111, 118, 125–31 (2d Cir. 2010).

167 *Id.* at 122.

168 *Id.*

169 *Id.* at 120–21, 131–45. In places, the court refers to the question before it as whether corporations are the subjects of international law. *Id.* at 126. For a general discussion of this question, see Jose E. Alvarez, *Are Corporations "Subjects" of International Law?* (N.Y. Univ. Sch. Law, Pub. Law & Legal Theory Working Paper Grp., Paper No. 10-77, 2010), *available at* http://ssrn.com/abstract=1703465.

inconsistent with the Supreme Court's approach to the statute in *Sosa*.[170]

No aspect of ATS litigation "depends entirely" upon "liability under international law."[171] The statute was not understood in *Sosa* as directing the courts to apply international law shorn from its domestic law context. Indeed, as discussed above, the *Sosa* standard for the underlying conduct—it must violate an international law norm of the specificity and "acceptance among civilized nations" that piracy, violations of safe conduct, and assaults on ambassadors enjoyed in 1789—is entirely unique to the United States.[172] Some contemporary violations of international law may not meet the universality and specificity standard that the Court set out in *Sosa*. And even for the violations of international law that meet *Sosa*'s domestic-law-imposed-standard, international law does not provide for "liability," at least not civil liability. The ATS provides domestic civil liability for some violations of international criminal law not because international law itself does so, but instead because the *Sosa* Court concluded that this best effectuates the historic and contemporary intentions of Congress.[173]

The *Kiobel* opinion thus asks the wrong question: whether customary international law imposes duties directly on corporations. The question compelled by *Sosa* is instead whether Congress would have intended corporations to be liable for conduct that is actionable under the ATS when committed by other nonstate actors. International law is relevant in answering this question, of course. If international law clearly imposed liability specifically on corporations, as it does for individuals in some circumstances, the answer would likely be yes, and if international law prohibited corporate liability (as it prohibits most actions against states themselves), then the answer would likely be no. But it does neither, so the issue is more difficult. Some evidence may suggest that at least in the context of piracy, the core original concern was to eliminate the conduct itself and provide compensation to victims, without much regard to corporate form.[174] The

170 Indeed, the *Kiobel* opinion does not itself look solely to international law. Instead, it asks whether customary international law imposes liability on corporations with a level of universality and specificity comparable to that with which customary international law outlawed piracy, safe-conducts, and assaults against ambassadors in 1789. *See Kiobel*, 621 F.3d at 130, 136. This standard derives from domestic law.

171 *Id.* at 122.

172 *See* discussion *supra* Part II.

173 *Cf. Kiobel*, 621 F.3d at 151–53 (Leval, J., concurring) (arguing that the failure of international criminal tribunals to impose liability on corporations does not preclude civil liability).

174 *See* The Marianna Flora, 24 U.S. (11 Wheat.) 1, 40–41 (1825); 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 1136–37 (Gaillard Hunt ed., 1912).

same remains true of piracy today.[175] This is consistent with the kind of conduct regulated in ATS cases, which is especially damaging to international affairs. Moreover, recall that the issue of choosing between international and domestic law for different aspects of the case did not arise because international law was considered part of the "general law."[176] None of this conclusively demonstrates what Congress did or would intend with respect to corporate liability, but the important point is that congressional intent matters in the application of the ATS.

There is another reason to view corporate liability as ultimately a question of domestic federal common law based on international law: it is heavily informed by an important set of policy debates that should not be obscured through the veil of "choice of law" questions. That is, in my view, whether one thinks that corporations should be held liable in ATS cases does not generally turn on the choice-of-law question; rather, it works the other way around. This is not surprising because the choice of law question in its binary form does not have an entirely obvious answer because the policy debates are very significant and because the outcome of this issue matters tremendously to the scope of ATS litigation. Framing the question as one of domestic common law may invite a resolution that beneficially focuses on some aspects of the underlying policy concerns.

B. Corporate Liability or No?

The policy debate about corporate liability in ATS cases frequently focuses on the promotion of human rights and development, and on potential disadvantages of imposing liability on corporate defendants with little or no connection to the United States.[177] The second issue is addressed by international law, in particular prescriptive jurisdiction, which is discussed below.[178] With respect to the first

175 The Convention on the Law of the Sea, opened for signature Dec. 10, 1982, 1833 U.N.T.S. 3 (entered into force Nov. 16, 1994), provides that "every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board." *See id.* This language appears to contemplate the seizure of property without limitations based on corporate form.

176 *Sosa*, 542 U.S. at 729; *id.* at 739–40 (Scalia, J., concurring).

177 *See, e.g.*, Brief of the Governments of the Commonwealth of Australia, the Swiss Confederation & the United Kingdom as Amici Curiae in Support of the Petitioner, *Sosa*, 542 U.S. 642 (No. 03-339); Bellinger, *supra* note 49, at 8–11.

178 Note jurisdiction to adjudicate may also be an issue, although corporations that lack any connection to the United States are not subject to personal jurisdiction in this country. Lack of connection to the United States may also provide the basis for

issue, opponents of corporate liability argue (especially in connection with aiding and abetting liability) that the prospect of ATS litigation might deter socially desirable investment in developing countries.[179] Proponents argue that corporations should not escape liability when they support, participate in, and benefit financially from human rights abuses,[180] that deterring human rights violations promotes growth and development,[181] and that in many ATS cases the type of industry involved (extraction of natural resources) suggests that investment would not be deterred because it cannot be replicated elsewhere.[182]

Contrary to the Second Circuit's decision in *Kiobel*, the ATS should be interpreted to permit liability for corporations, but the executive branch should be accorded some deference in these cases and principles of prescriptive jurisdiction limit the overall set of actionable claims.[183] Cases against corporations should continue to go forward (subject to the two limitations discussed in more detail below) for the following reasons. First, as discussed in the previous section, the appropriate question after *Sosa* is not whether international law imposes duties or liability directly on corporations as one form of nonstate actor. Instead, the question is whether Congress would intend (or have intended) to extend liability to corporations for conduct that meets the high *Sosa* standard for universality and specificity and which is prohibited to other nonstate actors.[184] Sec-

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dismissals on forum non conveniens grounds. *See generally* Cortelyou Kenney, Comment, *Disaster in the Amazon: Dodging "Boomerang Suits" in Transnational Human Rights Litigation*, 97 CALIF. L. REV. 857, 896–97 (2009) (arguing for the more ready use of forum non conveniens).

179 *See, e.g.*, Brief for the United States of America as Amicus Curiae, *supra* note 96, at 3 (reasoning in a case against corporations that "recognition of an aiding and abetting claim as a matter of federal common law would hamper the policy of encouraging positive change in developing countries via economic investment"); Bellinger, *supra* note 49, at 5–6; Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT'L L.J. 271, 316–18 (2009); Curtis A. Bradley & Jack L. Goldsmith, *Rights Case Gone Wrong*, WASH. POST, Apr. 19, 2009, at A19; Declaration by Justice Minister Penuell Maduna, *supra* note 146, at 12 ("Permitting this litigation to go forward will, in the government's view, discourage much-needed direct foreign investment in South Africa . . . ."); *cf.* Glovin & Cohen, *supra* note 148 (reporting that the South African government now supports the litigation as narrowed by the district court judge).

180 *See* Kevin R. Carter, Note, *Amending the Alien Tort Claims Act: Protecting Human Rights or Closing Off Corporate Accountability?*, 38 CASE W. RES. J. INT'L L. 629, 648–52 (2007).

181 *See* Herz, *supra* note 157, at 227–30.

182 *See* Stephens, *supra* note 129, at 806–07.

183 *See infra* Part IV.

184 *See supra* text accompanying notes 166–76.

ond, Congress has had ample opportunity under both Republican and Democratic administrations to restrict or eliminate ATS cases against corporations, but has not done so.[185] This is weak indicia of congressional intent, to be sure, but we are working in an area in which congressional will is both important because *Sosa* relies so heavily upon it in construing the ATS[186] and it is very hard to divine.[187] The *Sosa* opinion employed similar reasoning.[188] Third, domestic U.S. law routinely recognizes civil liability for corporations,[189] and there is no specific evidence that Congress did (and does) not intend to provide for such liability with the ATS.[190]

Fourth, although international law does not clearly address the issue of civil corporate liability, it imposes some duties on nonstate actors generally, and increasingly on corporations themselves; this is an area of change and development in customary international law. Fifth, for the reasons already described, Congress has a strong interest in providing broad civil redress for the limited offense actionable under the ATS.[191] Corporations can only be liable when the underlying conduct meets *Sosa*'s high standard for specificity and uniformity. Sixth, if prescriptive jurisdiction imposes real limits on ATS cases, as it should, then the set of cases that can go forward at all is somewhat

185 An amendment to the ATS was proposed in 2005 and quickly withdrawn. *See* S. 1874, 109th Cong. (2005).

186 *See supra* note 15 and accompanying text.

187 The *Sosa* Court looked to origins of the ATS itself, the enactment of the Torture Victim Protection Act, and the use of non-self-execution clauses in treaties. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 728 (2004). For different reasons, these are all difficult sources from which to infer the intentions of Congress.

188 *See id.* at 731 ("The position we take today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided *Filartiga v. Pena-Irala*, and for practical purposes the point of today's disagreement has been focused since the exchange between Judge Edwards and Judge Bork in *Tel-Oren v. Libyan Arab Republic*. Congress, however, has not only expressed no disagreement with our view of the proper exercise of the judicial power, but has responded to its most notable instance by enacting legislation supplementing the judicial determination in some detail." (citations omitted)); *see also* Ku & Yoo, *supra* note 68, at 174 (discussing and criticizing the *Sosa* Court's reliance on legislative silence as indicative of legislative intent).

189 *See* Mason, *supra* note 89, at 1173.

190 The enactment of the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2006)), might be helpful in interpreting the ATS, but it is unclear whether the TVPA extends liability to corporations. *See* Bowoto v. Chevron Corp., No. C 99-02506 SI, 2006 WL 2455752, at *2 (N.D. Cal. Aug. 22, 2006); Mujica v. Occidental Petrol. Corp., 381 F. Supp. 2d 1164, 1175–76 (C.D. Cal. 2005). *But see* Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345, 1358–59 (S.D. Fla. 2003); Estate of Rodriquez v. Drummond Co., 256 F. Supp. 2d 1250, 1267 (N.D. Ala. 2003).

191 *See supra* notes 62–70 and accompanying text.

limited, reducing the overall costs associated with corporate liability in the first place. Indeed, prescriptive jurisdiction may be an appropriate basis upon which to dismiss some claims in the *Kiobel* case itself. Cases that remain in U.S. courts are accordingly the very cases in which Congress is most likely to want to see the ATS enforced, for they involve corporations related to the United States and/or norms around which the international consensus is very high, because the conduct involved is especially reprehensible and disruptive to the international order.

Finally, for the reasons described above, courts should afford modest deference to the executive branch, at least to the extent the executive branch expresses a view about the optimal content of evolving norms of customary international law.[192] If, for example, the executive branch argues that customary international law should or should not impose obligations directly on corporations and appears generally committed to this position, courts should give this some weight, as this is an issue on which customary international law is still developing, and domestic ATS litigation may be used as evidence of customary international law. In this sense the issue is similar to the choice between knowledge and purpose as the mens rea in secondary liability cases.

IV. PRESCRIPTIVE JURISDICTION, UNIVERSAL JURISDICTION, AND THE ATS

This Part briefly considers prescriptive jurisdiction limits on ATS cases.[193] Unlike the prior two Parts on accomplice and corporate liability, this section discusses potential violations of international law. Prescriptive jurisdiction means the power of a country to apply its laws to regulate particular conduct. It is well established that states can exercise prescriptive jurisdiction over conduct that takes place in their territory or over their own nationals, but ATS cases sometimes involve the legal regulation of conduct that takes place outside the United States by defendants that are not U.S. nationals.[194] Universal jurisdic-

192 *See supra* Part II.C.2.

193 Adjudicatory jurisdiction may also be implicated in ATS cases. Arguably, universal jurisdiction allows a state both to "proscribe extraterritorial conduct with which it has no connection, and to empower its courts to adjudicate such conduct." Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L L. 142, 144 (2006).

194 Generally accepted bases for a state's jurisdiction to prescribe include: conduct that takes place in the state's territory; the status of persons within its territory; extraterritorial conduct that has or is intended to have substantial effect within the territory; the status or conduct of the state's own nationals; and extraterritorial conduct

tion allows a nation to prescribe conduct where it otherwise lacks the basis for doing so, but it only includes a small set of international law violations.[195] In *Sosa*, Justice Breyer reasoned in a concurring opinion that principles of international comity could be violated in ATS cases where there is no other basis for jurisdiction, and where the claims extend beyond those international norms for which universal jurisdiction is accepted, a group which includes at least torture, genocide, crimes against humanity, and war crimes.[196] Consistent with Justice Breyer's reasoning, the ATS, pursuant to standard canons of statutory interpretation,[197] and with what appears to be the original concerns animating the statute,[198] should not be interpreted in a way that violates customary international law.[199] Unless there is some other basis for prescriptive jurisdiction, the United States risks violating international law in ATS cases, absent universal jurisdiction—assuming that universal jurisdiction applies to civil cases at all.[200] This could be a

directed against the security of the state. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987). Some ATS claims fall into one or more of these categories, including cases brought against U.S. corporations. *See, e.g.*, Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009).

195 *See* RESTATEMENT (THIRD), *supra* note 195, § 402; *see also* Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO. L.J. 1057, 1117–18 (2004) (justifying universal jurisdiction as a means to rectifying a crime against humanity at large, particularly when the nation involved is unable to prosecute).

196 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 761–62 (2004) (Breyer, J., concurring in part and concurring in the judgment); *cf.* United States v. Yousef, 327 F.3d 56, 105 (2d Cir. 2003) (chronicling the historical use of universal jurisdiction).

197 *See* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004); Hartford Fire Ins. Co. v. California, 509 U.S. 764, 814–19 (1993) (Scalia, J., dissenting); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

198 *See* Lee, *supra* note 57, at 845–48.

199 Thus, for prescriptive jurisdiction, courts are interpreting U.S. law (here the ATS) so as to avoid violations of international law; this is a canon of statutory interpretation that relies on international law, but it is not an application of federal common law. A second potentially relevant canon of statutory interpretation is the presumption against extraterritoriality, pursuant to which U.S. courts generally interpret statutes to apply to domestic but not extraterritorial conduct. *See generally* William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85 (1998) (explaining and examining the presumption). Some have argued that the presumption applies to the ATS, but the subject matter of the statute itself would seem to defeat the presumption.

200 *See Sosa*, 542 U.S. at 761–62 (Breyer, J., concurring); RESTATEMENT (THIRD), *supra* note 195, § 404 cmt. b; LUC REYDAMS, UNIVERSAL JURISDICTION 3 (2003) ("The presumption is that if universal criminal jurisdiction is permissible under international law, universal civil jurisdiction is also permissible . . . ."); Cleveland, *supra* note 133, at 976–77; Donovan & Roberts, *supra* note 193, at 153 (surveying civil remedies for conduct subject to universal criminal jurisdiction and concluding that "[i]t could

significant limitation on ATS litigation. As just one example,[201] to the extent that *In re South African Apartheid Litigation* is based on apartheid itself, it would be dismissed unless apartheid could be established as a universal jurisdiction offense or another basis for jurisdiction is present.[202] Universal jurisdiction is itself contested,[203] and as suggested above its application to civil cases is not firmly established. These issues are beyond the scope of this Article, except to say that if universal jurisdiction does not apply, then ATS cases would be limited to those situations in which another basis for jurisdiction is present.

Prescriptive jurisdiction remains an issue regardless of whether the conduct-regulating norm in the case is understood as federal common law or international law. Even if the conduct-regulating norm is understood as "pure" international law, the generation of a cause of action and remedy come from domestic federal common law, raising the prescriptive jurisdiction issue.[204] As to the norms drawn from

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be said" that "a permissive customary norm is beginning to emerge," or that the "well-accepted modern rationale" for universal criminal jurisdiction extends to civil remedies). Some authors have linked universal jurisdiction to domestic exhaustion of remedies. *See* Donovan & Roberts, *supra* note 193, at 157–59; Orentlicher, *supra* note 195, at 1130–32; *see also,* REYDAMS, *supra*, at 188–91 (discussing Menchú Tum v. Montt, 3 Yrbk Int'l Humanitarian L. 691 (Dec. 13, 2000 (Spain)). Although exhaustion is beyond the scope of this Article, the emphasis here on applying the ATS to avoid conflict with international law suggests that exhaustion requirements apply as well. *Cf.* Sarei v. Rio Tinto, PLC, 550 F.3d 822, 830 (9th 2008) (suggesting exhaustion may be more important in ATS cases, given the lack of explicit consent of other sovereigns).

201 Prescriptive jurisdiction limits might also narrow the Rio Tinto litigation. *See Sarei*, 550 F.3d at 824–25 (reviewing a case against British and Australian corporations for war crimes, crimes against humanity, racial discrimination, and environmental harms).

202 *See* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 337 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part); RESTATEMENT (THIRD), *supra* note 195, § 404 (identifying universal jurisdiction offenses as including "piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism"); *cf.* International Convention on the Suppression and Punishment of the Crime of Apartheid, *supra* note 111, art. IV (providing for universal jurisdiction).

203 *See, e.g.*, Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 327–41; Orentlicher, *supra* note 195, 1058–65.

204 *See* Donovan & Roberts, *supra* note 193, at 144 (noting that extraterritorial prescriptive jurisdiction is "arguably less problematic" when international law is the "source and character of the standards," but that problems remain because of differences in remedies and enforcement, and in the inevitable variations in how international norms are implemented through domestic legislation); Ramsey, *supra* note 179, at 292–93. *But see* Keitner, *supra* note 11, at 100–01 (suggesting that the choice of law issue for aiding and abetting should be resolved in favor of international law because this would ease concerns about international comity (prescriptive jurisdiction)).

international law, the question should not be whether they are termed domestic law or international law, but instead the extent to which they correspond to the offenses for which universal jurisdiction is accepted.[205] In general, the limitations imposed by customary international law on a state's power to prescribe law extraterritorially capture as a legal matter the often-articulated policy concern that some ATS litigation involves issues that have little or no connection to the United States.

Jurisdictional limits have been taken even further by at least one commentator who argues that accomplice liability must *itself* be a universal jurisdiction offense,[206] even if the underlying conduct is a universal jurisdiction offense. Thus, on this view, war crimes are universal jurisdiction offenses but aiding and abetting war crimes must be separately established as a universal jurisdiction offense, not merely as a violation of international law.[207] Moreover, this view holds that to establish universal jurisdiction for aiding and abetting liability, the relevant sources come not from international criminal tribunals and international conventions, but instead from the actual practice of nation-states.[208] Universal jurisdiction is not, however, generally understood as itself generated by state practice; instead, the basis for universal jurisdiction is the widespread condemnation of the conduct and the mutual interest in eradicating it—not widespread state practice of universal jurisdiction itself.[209] Indeed, this is one reason that universal jurisdiction is controversial.

With respect to secondary liability specifically, it does not seem that universal jurisdiction must be separately established for aiding and abetting. First, at least some states incorporating universal jurisdiction into their domestic legislation have apparently assumed that it

205 *See* Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 VA. J. INT'L L. 149, 161–62 (2006).

206 *See* Ramsey, *supra* note 179, at 319–20.

207 *See id.*

208 *See id.* at 314–15.

209 *See* RESTATEMENT (THIRD), *supra* note 195, § 404 cmt. a; Donovan & Roberts, *supra* note 193, at 145 ("[U]niversal criminal jurisdiction remains little exercised, albeit well accepted . . . ."); William A. Schabas, *Foreword* to REYDAMS, *supra* note 200, at ix (noting the "stunning paucity of national practice" with respect to universal jurisdiction); *see also* RESTATEMENT (THIRD), *supra* note 195, § 404 reporter's note 1 (noting that with respect to genocide and war crimes—for which universal jurisdiction is largely uncontroversial—"no state has exercised such jurisdiction in circumstances where no other basis for jurisdiction under § 402 was present"). The extent to which state practice is necessary for the formation of customary international law is generally contested. *See* Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 770–91 (2001).

extends to various forms of secondary liability, even where there is no treaty providing universal jurisdiction for secondary liability. With respect to the Geneva Conventions, for example, which do provide for universal jurisdiction over grave breaches[210] but do not include secondary liability, states such as Australia[211] and Kenya[212] have passed national laws providing for universal jurisdiction over those who aid in the commission of grave breaches.[213] This state practice suggests either that universal jurisdiction need not be separately established, or that customary international law already recognizes universal jurisdiction for aiding and abetting, at least for war crimes.

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210 *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49, *entered into force* Oct. 21, 1950, 71 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 50, *entered into force* Oct. 21, 1950, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 129, *entered into force* Oct. 21, 1950, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Times of War art. 146, *entered into force* Oct. 21, 1950, 75 U.N.T.S. 287.

211 Until 2002, Australia provided for universal jurisdiction over a person who "commits, or aids, abets or procures" a grave breach of the Geneva Conventions, even though the Conventions themselves did not provide aiding and abetting liability, much less for universal jurisdiction over such offenses. *See Geneva Conventions Act 1957*, s 7 (Austl.), *superseded by International Criminal Court Act 2002* (Austl.); *see also* REYDAMS, *supra* note 200, at 88–89 (quoting and describing the statute). Although that statute was superseded, its replacement provides for universal jurisdiction over "core ICC crimes," REYDAMS, *supra* note 200, at 88, presumably including secondary liability. *Cf.* Rome Statute, *supra* note 106, art. 25(3) (providing for secondary criminal liability).

212 *See* The Geneva Conventions Act, (1968) Cap. 198 § 3 (Kenya); *see also* Antonina Okuta, *National Legislation for the Prosecution of International Crimes in Kenya*, 7 J. INT'L CRIM. JUST. 1063, 1075 (2009) (discussing the statute).

213 *See also* REYDAMS, *supra* note 200, at 100–01 (describing an Austrian universal jurisdiction case involving "complicity in genocide," which is covered by the Genocide Convention, but the Convention itself does not provide for universal jurisdiction); *id.* at 132–33 (describing a French statute that appears to apply universal jurisdiction to "perpetrators or accomplices" of some international criminal law offenses); *id.* at 149–52, 155–56 (describing similar cases in Germany). Canada may provide a counterexample. Canada's Crimes Against Humanity and War Crimes Act of 2000, S.C. 2000, c. 24, appears to provide for universal jurisdiction over genocide, crimes against humanity, and war crimes, *id.* arts. 6, 8, and provides that some kinds of assistance are indictable conduct, but apparently without extending universal jurisdiction, *id.* art. 6, to them. A full inventory of state practice is beyond the scope this Article, but more examples like that of Canada would obviously undermine the thesis in this paragraph.

CONCLUSION

The choice that courts confront in ATS cases between international law and federal common law is unsatisfactory and unnecessary. Treating virtually all issues as governed by federal common law spares courts from looking to international law for clear-cut answers that it does not really provide, it may work to insulate them from charges that they misunderstand and misapply international law, and it avoids the complicated choice of law question at the outset. In reality, all aspects of ATS litigation after *Sosa* are fundamentally informed by the inferred intentions of Congress, from the question of what substantive international norms are actionable at all, to questions of secondary and corporate liability. The law applied by the courts in ATS cases is shaped by domestic legal sources, and it is best to refer to it as federal common law. Those who favor a robust international legal system and the domestic enforcement of international law may resist this conclusion, but they should not. International law does not answer some of the questions posed by ATS litigation, and it does no real service to international law to pretend that it does. Moreover, a careful reading of *Sosa* shows that linking the ATS to the inferred intentions of Congress allows U.S. courts to develop some international legal norms beyond those that are already firmly established, as long as limits on prescriptive jurisdiction imposed by international law itself are not violated.